

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 361 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

PRABHAKAR NARAYAN KASHIKAR

Appearance:

Mr. S.P. Dave, AGP for appellants.

MR PM THAKKAR for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 13/10/2000

ORAL JUDGEMENT

Whether the interpretation of the bond made by
the District Judge exonerating the respondent from the
liability undertaken is erroneous is the substantial
question of law raised for determination in this appeal.

2. The facts in nutshell are that Bipinchandra
Girdharlal Karia filed Regular Civil Suit No. 721 of
1995 in the Court of the Civil Judge (SD), Rajkot for a
declaratory relief. The Sales Tax Officer had made the
assessment and that was challenged in that suit alleging

that the same was one sided, illegal, and order to recover the sales-tax was also illegal and inoperative etc. In that suit, application for interim relief was also filed, which was granted on condition that Bipinchandra Girdharlal Karia the plaintiff in the suit will execute the bond furnishing the surety in the sum of Rs. 11,000/-. The respondent then stood as the surety and he executed the bond. In the Bond the relevant portion thereof is couched in the words as follows:

"Accordingly, I, Prabhakar Narayan Kashikar, of my own free will, stand security to the extent of Rs. 11000/- (Rs. Eleven thousand only) and covenant that if the stay vacated or decree passed, the said plaintiff shall duly act in accordance with the decree of this Court and shall pay whatever may be the payable to him thereunder, and if he should fail therein then any amount so payable shall be realised from me and my legal representatives."

The suit was then dismissed for default of appearance. As the suit came to be dismissed interim relief granted also automatically came to be lifted. Thereafter the respondent received a letter from the Mamlatdar (Recovery) calling upon him to pay the sum of Rs.11,000/= for which he had stood as surety for Bipinchandra Karia. The respondent after going through the letter found that the demand made by the Sales Tax Department through the Mamlatdar (Recovery) was illegal. A notice to the Sales Tax Department, Collector and Mamlatdar (Recovery) under Section 80 of the Civil Procedure Code was then given. Despite the notice, the authorities were insisting for the payment of Rs.11,000/- for which he stood as the surety. The respondent was of the firm belief that under the Surety Bond, the Sales Tax Department was not entitled to demand the tax amount or recover the tax amount. He therefore filed a suit being Regular Civil Suit No. 431 of 1981 in the Court of the Civil Judge (SD), Rajkot for a declaration that the appellants were not entitled to recover any amount of sales-tax and for the injunction restraining the appellants from recovering the said amount etc.

3. The appellants against whom the suit was filed appeared before the trial Court and filing the written statement Ex. 30 contended inter alia that the suit without notice was not at all maintainable. A question regarding the jurisdiction of the Court was raised and liability to pay the amount was denied. The learned

Judge then framed necessary issues and appreciating the evidence led before him, he reached the conclusion that the action of the appellants to recover the amount of Rs. 11,000/= was not legal and valid. The suit was not at all bad for want of notice under Section 80 of the Civil Procedure Code. The Court was having the jurisdiction to decide the suit. The suit was not properly valued for the purpose of court fees. He then concluded that the suit was liable to be dismissed and accordingly he on 10th January 1983 dismissed the suit with costs. Against such judgment and decree of the then learned Civil Judge (SD) the respondent preferred Regular Civil Appeal No. 68 of 1983 in the Court of the District Judge at Rajkot. The said appeal was assigned to the then learned Joint District Judge, Rajkot for hearing and disposal in accordance with law who hearing the parties allowed the appeal, set aside the judgment and decree passed by the trial court and decreed the suit as prayed for on 30th July 1983. It is against that judgment and decree this appeal is filed by original defendants calling in question the legality and validity of the decree passed in First Appeal on several grounds, but at the time of hearing the appeal was admitted only on the aforesaid one substantial question of law as before both the lower courts the question about the interpretation of the bond executed by the respondent in Regular Civil Suit No. 721 of 1975 filed by Bipinchandra Girdharlal Karia was raised, and hotly contested.

4. Mr. Dave, the learned AGP representing the appellants contends that the learned Joint District Judge fell into error in interpreting the bond in question. As per the bond executed by the present respondent he accepted the liability to pay the amount of sales tax in the event decree was passed against Bipinchandra Karia or interim relief granted in the suit was vacated. When the suit was dismissed for default of appearance certainly a decree was not passed & would not be passed, and so contingency never arose for the appellants to have the recovery of the sales-tax amount from the respondent but certainly the appellants did acquire a right to demand and recover the sales-tax amount of Rs. 11,000/= as per the liability accepted under the bond especially when the interim relief came to be vacated. Even if no specific order in that regard was passed when the suit was dismissed, interim relief should be deemed to have been automatically vacated. When accordingly the stay was vacated the liability undertaken by executing the bond to pay the sales-tax amount arose on the part of the respondent. The respondent was therefore under law bound to make the payment but when he avoided to make the

payment the respondent had to resort to the action for the recovery available in law and when Mamlatdar (Recovery) started to recover the amount issuing the letter the respondent was bound to esteem the same because the liability to pay arose under the bond soon after the stay in Special Civil Suit No. 721/85 came to be lifted but the learned Joint District Judge incorrectly construing the bond that the condition in the bond was not satisfied as there was nothing on record to show that the interim relief granted initially came to be vacated on merits, erroneously passed the decree as prayed for.

5. In reply to such contention, Mr. Niraj Ashar, the 1d. advocate who appears for Mr. P.M. Thakkar, 1d. advocate for the respondent submits that the interpretation of the bond made by the 1d. Joint District Judge is perfectly right because decree was not passed in the suit and payment of sales tax never depended upon the vacation of the interim relief. The decree prayed for has been rightly passed by the appellate Court.

6. In view of such rival contentions and facts stated above, the question of interpretation of the bond which is quoted hereinabove arises for consideration. The then learned Joint District Judge disposing of the appeal has in his judgment giving logical reasons reached the conclusion that the respondent's liability thereunder did not arise. I generally agree with his reasonings and conclusions drawn. It is therefore not necessary to restate the same. However, it may be stated that no other view than already taken by the learned Joint District Judge is possible. Of course, initial part of the bond quoted hereinabove would lead any one to believe *prima facie* that the respondent undertook the liability to pay the sales-tax of Rs. 11,000/- in the event the decree in that regard is either passed, or the stay is vacated. In the former suit, decree was not passed because the same was dismissed for default of appearance. One of the conditions namely passing of the decree for giving rise to the liability to pay sales-tax amount lapsed or ceased to operate or expired. Whether second condition survived has to be examined. In other words, because of the dismissal of the suit no doubt the stay granted should be deemed to have been vacated, the resulting question that arises for consideration is whether in case of these exigencies out of two namely vacation of the stay the liability of the respondent to pay arose.

7. When the whole of the bond is read with meticulous care without isolating certain portion or word or statement it becomes clear that the respondent did not undertake the liability to make the payment in case the stay is vacated. The earlier portion is qualified by the latter portion in the bond by necessary elucidation. It is made clear later on that the respondent would pay in accordance with the decree of the court of the Civil Judge (SD) and shall pay whatever may be required to be paid thereunder. The word "thereunder" refers to the decree and such elucidation is made mentioning in the latter portion that the said plaintiff shall duly act in accordance with the decree of this court and shall pay whatever may be due to him thereunder. He therefore by such qualification and elucidation made it clear that he would be paying the tax only if the decree is passed directing Bipinchandra Karia to pay the amount. Certainly in the case on hand such decree is not passed and therefore the liability of the respondent under the bond never arose.

8. Further, the respondent also undertook to pay the amount, which remained unpaid after first making an attempt to recover the same from Bipinchandra Karia. As per the bond the respondent thus accepted the conditional liability. The appellants had first to make an attempt to recover the amount from Bipinchandra Karia in case if the decree is passed, and if some amount remained to be recovered, meaning thereby either partly or fully for whatever may be the reason making payment of the same would then be the respondent's liability. As the decree is not passed the question to first make the attempt for recovery from Bipinchandra Karia did not arise. The respondent in view of such construction of the bond cannot be made liable to pay the amount of Rs. 11,000/=. In other words, the appellants had first to obtain the decree against Bipinchandra Karia and then first try to realise the amount from Bipinchandra Karia, and if something remained due the same was to be paid by the respondent. All these conditions of the bond are not present in the case. The learned Joint District Judge was therefore perfectly right in interpreting the bond accordingly and holding that respondent's liability did not arise and was consequently right in allowing the appeal and decreeing the suit filed by the respondent.

9. For the aforesaid reasons, there is no reason to interfere with the judgment and decree passed by the lower appellate court. The appeal merits dismissal and is dismissed accordingly. No order as to costs.

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